FOR ARGUMENT

No. 78-1845

IN THE

Supreme Court of the United States

OCTOBER TERM, 1979

STATE OF ILLINOIS,

Petitioner

vs.

JOHN M. VITALE,

Respondent

On Writ of Certiorari to the Supreme Court of the State of Illinois

BRIEF AND ARGUMENT FOR RESPONDENT

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BRIEF AND ARGUMENT FOR RESPONDENT

Pursuant to the mandate of this Court, the Illinois Supreme Court on March 22, 1979, certified that its judgment as expressed in its opinion in this cause was based upon federal constitutional grounds. Pursuant to this Court's order of October 1, 1979, granting the Writ of Certiorari in this case, your Respondent, John M. Vitale respectfully requests that this Honorable Court affirm the decision of the Supreme Court of Illinois which was rendered on April 3, 1978.

STATEMENT OF THE CASE

The statement of the case presented to this Court by the State is incorrect, if not deceptive. The State's brief relies entirely on the dissenting opinion of Mr. Justice Underwood of the Illinois Supreme Court. Mr. Justice Underwood's dissent rests primarily on a police report that was never offered, let alone admitted, into evidence in this cause (A-21—A-26). How this police report ever became a part of the official record in this case is a mystery. Nevertheless, the State and Mr. Justice Underwood use it as a factual basis for rationalizing their legal conclusions. It is highly prejudicial to John Vitale as it goes to the merits of the case which, to date, have never been an issue in the matter now before this Court. However, the State and Mr. Justice Underwood would have this Court believe that this police report should be considered and accepted as admitted evidence.

To allow or accept any reference to a police report that emerges out of nowhere and appears in the official court record is to ignore the most basic rules of evidence, not to mention the concept of fundamental fairness. The mere fact that Mr. Justice Underwood refers to and relies on this police report in justifying his dissent indicates that he has formed an opinion on the merits of the case. In fact, Mr. Justice Underwood suggests that he has a preconceived opinion about this case when he states, ... "but the difficulty of an absolute rule is amply demonstrated by the majority holding here which permits a defendant who has *caused* two deaths to escape punishment other than a nominal fine." (Petition for Certiorari, P. A-22). Mr. Justice Underwood, on the basis of a police report not in evidence and, in any event, inadmissible, has concluded guilt of involuntary manslaughter on the part of John Vitale.

The police report and any reference to it in any part of the State's brief must be totally rejected. To do otherwise would create a wholly new appealable issue. The People and Mr.

Justice Underwood should have known better but, in any event, it renders their respective positions tainted and untenable.

In all other respects, the State's statement of the case seems accurate.

ARGUMENT

AFTER HAVING BEEN TRIED AND CONVICTED IN A STATE COURT FOR THE OFFENSE OF FAILURE TO REDUCE SPEED TO AVOID AN ACCIDENT, THE DOUBLE JEOPARDY CLAUSE PRECLUDED JOHN VITALE FROM BEING SUBSEQUENTLY AND FURTHER PROSECUTED ON CHARGES OF INVOLUNTARY MANSLAUGHTER.

I

THE TRAFFIC OFFENSE OF FAILURE TO REDUCE SPEED AND THE OFFENSE OF INVOLUNTARY MANSLAUGHTER WERE THE SAME OFFENSE UNDER THE DOUBLE JEOPARDY CLAUSE AND SHOULD HAVE BEEN PROSECUTED IN A SINGLE PROCEEDING. RESPONDENT'S RIGHT TO BE FREE FROM AN IMPROPER SECOND JEOPARDY FOR THE SAME OFFENSE WAS VIOLATED WHEN HE WAS CHARGED WITH INVOLUNTARY MANSLAUGHTER THE DAY AFTER HIS TRIAL AND CONVICTION ON THE TRAFFIC CHARGE.

While operating his automobile, John Vitale struck two children, one of whom died immediately and the other the following day. As a result of this single act, John Vitale was first charged with failing to reduce speed to avoid an accident and, the day after he had been tried and convicted on this traffic charge, he was charged with two counts of involuntary manslaughter in a juvenile petition. The majority of the Illinois

Supreme Court held that the two offenses, failure to reduce speed to avoid an accident and involuntary manslaughter, were the same offense for double jeopardy purposes and, therefore, the conviction on the traffic charge of failure to reduce speed precluded the prosecution in a separate action for involuntary manslaughter.

In this case, it is conceded that all offenses arose from a single act, i.e. the accident which resulted in the deaths of the two children. There could have been no offense of failure to reduce speed to avoid an accident without the accident, and there could have been no manslaughter offense without the same accident resulting in death. Nevertheless, the People maintain that whatever offenses may have arisen from that single act, they, the People, are entitled to prosecute any such offenses in as many separate and successive prosecutions as they see fit, for the reason that each such offense may contain an element or elements different from the others. This is exactly the kind of situation that is forbidden by the Fifth Amendment guarantee against double jeopardy which is applicable to the States through the Fourteenth Amendment, *Benton* v. *Maryland,* 395 U.S. 784 (1969).

In its opinion, the majority of the Supreme Court of Illinois determined that the two separate statutory offenses of failing to reduce speed and involuntary manslaughter need not be identical, either in their basic ingredients or in their proof to be the "same" within the double jeopardy clause. They relied upon *Brown* v. *Ohio,* 432 U.S. 161 (1977), where this Court stated:

> "It has long been held that separate statutory crimes need not be identical—either in constituent elements or in actual proof—in order to be the same within the meaning of the constitutional prohibition."

The Illinois Supreme Court obviously agreed with the Illinois Appellate Court's conclusion that the acts in both the failure to reduce speed and the involuntary manslaughter offenses were

identical, with the exception that in the manslaughter offense a death was involved. However, the Illinois Supreme Court went beyond the compulsory joinder statutes to hold that both offenses were the same offense under the Double Jeopardy Clause, a reason they felt was even more compelling why John Vitale could not be subsequently prosecuted for the offense of involuntary manslaughter.

II

THE TRAFFIC OFFENSE FOR WHICH JOHN VITALE WAS TRIED AND CONVICTED WAS A LESSER INCLUDED OFFENSE OF INVOLUNTARY MANSLAUGHTER AND, FOR PURPOSES OF DOUBLE JEOPARDY, CONVICTION OF THE LESSER INCLUDED OFFENSE PRECLUDES PROSECUTION OF THE GREATER, JUST AS CONVICTION OF THE GREATER OFFENSE PRECLUDES PROSECUTION OF THE LESSER OFFENSE.

In its opinion, the Illinois Supreme Court examined the statutory definition of the crimes of involuntary manslaughter and failure to reduce speed and decided that failure to reduce speed was a lesser included offense of involuntary manslaughter. In their construction of these two statutes, the Illinois Supreme Court made, for purposes of this case, the offenses of failure to reduce speed and involuntary manslaughter the same offense. The Ohio courts "have the final authority to interpret. . . that State's legislation." *Brown* v. *Ohio,* 432 U.S. 161 (1977), citing *Garner* v. *Louisiana,* 368 U.S. 157 (1961). So, also, has the Illinois Supreme Court here interpreted its statutes and has determined that in this particular case the offense of failure to reduce speed is a lesser included offense of involuntary manslaughter. They have "authoritatively defined the elements" of the two Illinois statutes. *Brown* v. *Ohio,* 432 U.S. 161 (1977).

The People argue that Vitale was charged with separate, statutory crimes that were not identical in elements or in proof. What the People really are saying is that because they simply erred in not prosecuting all charges arising out of Vitale's accident in a single proceeding, they should be allowed a chance to redeem themselves by trying to extract a greater penalty out of Vitale. But this is precisely what the constitutional guarantee forbids. *Ashe* v. *Swenson,* 397 U.S. 426 (1970). Although no transcript of John Vitale's first trial was made, it is undisputed that he appeared in court, pleaded not guilty and after a full trial in which witnesses and evidence were presented against him, the trial court found him guilty of failure to reduce speed. In fact, John Vitale testified on direct and cross examination. If the State were allowed to re-try Vitale on the subsequent manslaughter charges, they would be relitigating the same, identical issues and facts that were brought out in the first trial on the traffic offense. It would be a mere reiteration of testimony. At best, they might be able to establish the greater offense of involuntary manslaughter but, in so doing, they would necessarily have to establish the lesser included offense of failure to reduce speed. Any lesser offense is included in the greater offense for the purpose of double jeopardy. *In Re Nielsen,* 141 (U.S. 176 (1889)).

Whatever logic there is to the People's argument justifying a separate and subsequent trial for manslaughter disappears when this case is viewed from a different perspective. If, for example, John Vitale had first been tried and convicted or acquitted of involuntary manslaughter, would anyone suggest that he could thereafter be prosecuted by the State in a separate proceeding at a subsequent date on the traffic charge? Speaking for the majority of the Illinois Supreme Court, the late Mr. Justice Dooley said, "The sequence of the prosecution is immaterial. The conviction of the lesser precludes conviction of the greater, just as conviction of the greater precludes conviction of the lesser. *Brown* v. *Ohio,* 432 U.S. 161 (1977); *In Re Nielsen,* 131 U.S. 176 (1889). It is irrelevant of what offense,

failing to reduce speed or involuntary manslaughter, Respondent was first convicted." (Petition for Certiorari A-8) In *Harris* v. *Oklahoma,* 433 U.S. 682 (1977), the defendant was convicted of felony murder in state court arising out of an armed robbery; he was subsequently convicted of the lesser offense of robbery with firearms in District Court. This Court held that the Double Jeopardy Clause barred prosecution of the lesser crime after conviction of the greater one. This Court stated that "... a person who has been tried and convicted for a crime which has various incidents included in it, ... cannot be a second time tried for one of those incidents without being twice put in jeopardy for the same offense." *Harris,* supra.

No matter how the State tries to manipulate this case, it would be impossible for them to ever prove the greater offense, involuntary manslaughter, without *a fortiori* proving the lesser included offense of failure to reduce speed to avoid an accident. As Mr. Justice Dooley stated in speaking for the majority of the Illinois Supreme Court: (Petition for Certiorari A-8)

> "As is usually the situation between greater and lesser included offenses, the lesser offense, failing to reduce speed, requires no proof beyond that which is necessary for conviction of the greater, involuntary manslaughter. Accordingly, for purposes of the double jeopardy clause, the greater offense is by definition the "same" as the lesser included offense within it."

If the State's position were to be adopted, they would be able to take Vitale's single act and turn it into any number of separate, statutory offenses which they could prosecute separately in successive prosecutions. What would bar them from filing charges and demanding separate trials for such offenses as failure to reduce speed to avoid an accident, driving too fast for conditions, reckless driving, reckless conduct, ignoring a crossing guard, reckless homicide, involuntary manslaughter and a host of similar offenses? Obviously, they would not be permitted to take such a single act and divide it into so many separate

statutory offenses, and this very point was clarified by this Court in *Brown* v. *Ohio*, 432 U.S. 161 (1977), where, in reversing Brown's second conviction, the Court said:

> "The Double Jeopardy Clause is not such a fragile guarantee that prosecutors can avoid its limitations by the simple expedient of dividing a single crime into a series of temporal or spatial units."

Applying this test to the instant case, clearly there was but one act which resulted in various charges being placed against John Vitale. Moreover, there was no time sequence between the traffic charge and the manslaughter charges such as existed in *Brown* v. *Ohio*, 432 U.S. 161 (1977). In *Brown*, Mr. Justice Blackmun, in his dissent, acknowledged that there could be a situation involving a time span that could cause him to agree with the holding in that case when he said:

> "It is possible, of course, that at some point the two acts would be so closely connected *in time* that the Double Jeopardy Clause would require treating them as one offense."

Both offenses here were the same and they could not be fragmented so as to create different offenses. The State, in attempting to place John Vitale on trial twice for the same offense, was properly barred by the constitutional prohibition of double jeopardy from imposing more than one punishment for the same offense. *Brown* v. *Ohio*, 432 U.S. 161 (1977).

CONCLUSION

For the reasons set forth above, the respondent, John Vitale, respectfully requests that this Honorable Court affirm the judgment of the Supreme Court of Illinois herein reviewed.

Respectfully submitted,

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